

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSE VALENTIN MORA, *et al.*,

Defendants.

Case Nos. 3:18-cr-00057-MMD-WGC;

AND

3:18-cr-00055-MMD-WGC

ORDER

AND RELATED CASES

I. SUMMARY

Defendant Jose Valentin Mora (“Mora”) moves to suppress evidence obtained by means of two wiretaps of two of his cell phones (“Motion”). (ECF No. 322.) Most of Mora’s co-defendants have been permitted to join in the Motion.¹ Defendants contend the wiretaps were unlawful and therefore intercepted communications and all derivative evidence must be suppressed. (*Id.*) This Court finds that the affidavits supporting each wiretap application (1) provided full and complete statements of the facts required by statute, and (2) the district judge who issued the wiretap did not abuse his discretion in concluding that the wiretaps were necessary to achieve the objectives of the underlying

///

¹The following joinders were filed in 3:18-cr-57-MMD-WGC: ECF No. 324 (Defendant Jorge Ayala-Chavez); ECF No. 325 (Marcos Antonio Hernandez-Cisneros); ECF No. 326 (Leon DeJesus Munera); ECF No. 327 (Sandy Diaz Tavares); ECF No. 328 (Juan Baca); ECF No. 329 (Shawn Curl); ECF No. 330 (Marco Antonio Ramirez); ECF No. 333 (Richard Rossall); ECF No. 334 (Angel Diaz); ECF No. 335 (Javier Chavez); ECF No. 338 (Elizabeth Reyes-Delacerda); ECF No. 340 (Jose Vega); ECF No. 348 (Ciara Hernandez). Munera subsequently withdrew his joinder at a hearing on September 9, 2019 (ECF No. 423). In 3:18-cr-55-MMD-WGC, the following joinders were filed: (ECF No. 67—Dagoberto Mora-Silva’s joinder filed as a motion); ECF No. 79 (joining the same motion refiled in that case as ECF No. 78).) The Court has considered the Motion, the joinders, the government’s response (ECF No. 358) and Mora’s reply (ECF No. 365.)

1 criminal investigation into an alleged Mora-led criminal conspiracy. Accordingly, the Court
2 denies the Motion and related supplement.

3 **II. FACTUAL FINDINGS²**

4 This case concerns what the government contends is a drug trafficking organization
5 (“DTO”) led by Mora (“Mora DTO”) that was distributing methamphetamine and various
6 drugs in the Reno-Sparks, Nevada area on or before January and June 2018. The Mora
7 DTO is believed to be supplied methamphetamine by Sureno gang members in the Los
8 Angeles, California area. (ECF No. 358-1 at 30.) Mora has been charged in three separate
9 cases: 3:18-cr-00057-MMD-WGC; 3:18-cr-00055-MMD-WGC, and 3:18-cr-00053-MMD-
10 WGC. The same Motion was filed in the two former cases.

11 The investigation into the Mora DTO began in January 2018 when Federal Bureau
12 of Investigation (“FBI”) agents in Reno, Nevada, received information that Mora was a
13 high-level methamphetamine trafficker controlling a northern Nevada DTO and was
14 importing large amounts of methamphetamine from southern California into northern
15 Nevada. (ECF No. 358-1 at 30–31.) That same month and the following, investigators
16 used a confidential human source (“CHS-1”), who was a paid federal informant, to transact
17 two successful controlled buys of methamphetamine. (*Id.* at 33–38.)

18 Investigators verified that Mora utilized a cellular telephone (775) 527-6931 (“TT-
19 1”) to coordinate distribution of the methamphetamine in northern Nevada. (*Id.* at 30, 32.)
20 CHS-1 informed that TT-1 was used to conduct the transactions. (*Id.* at 31.) An FBI
21 administrative subpoena revealed that TT-1 was subscribed to Mora. (*Id.*) On February 9,
22 2018, then Magistrate Judge Valerie P. Cooke signed an order authorizing the installation
23 of pen register with global positioning system (“GPS”) location capability for TT-1 which
24 the phone service carrier activated the same day. (*Id.*) Another such order was authorized
25 on March 29, 2018. (*Id.*)

26 ///

27 _____
28 ²Fed. R. Crim. P. 12(d) provides: “Where factual issues are involved in determining
a motion, the court must state its essential findings on the record.”

1 Using GPS location and physical surveillance agents confirmed TT-1's usage,
2 Mora's primary residence and working location. (*Id.* at 31–32.) During physical
3 surveillance, agents observed Mora driving a black Dodge Charger, confirmed as
4 registered to him, making brief stops at multiple locations in northern Nevada believed to
5 be consistent with drug deliveries. (*Id.* at 32.) Investigators combined pen register data
6 with toll analysis and subpoenas to telephone companies to confirm contacts between TT-
7 1 and Defendant Jose Vega in Fernley, Nevada, Defendant Luiz Acuna Grageda in
8 Sparks, Nevada, Defendant Michael Cepeda, a/k/a Mike Moreno in Sparks, Nevada,
9 Defendant Michelle Stewart in Reno, Nevada, and Defendant Steven Moreira in North
10 Hollywood, California. (*Id.* at 38–43.) Mora, Grageda, Moreira, and Cepeda are
11 documented Sureno gang members. (*Id.*) One mail cover was also initiated at Mora's
12 residence on March 6, 2018, without producing results. (*Id.* at 66.)

13 At the beginning of April 2018, the government submitted to District Judge Howard
14 D. McKibben an application pursuant to 18 U.S.C. § 2518 for an order authorizing a
15 wiretap of wire and electronic communications over TT-1 with Mora, Vega, Grageda,
16 Cepeda, Moreira, and Stewart listed as target subjects. (ECF No. 358-1.) The application
17 was supported by a 49-page affidavit by FBI Special Agent Scott Dunn ("First Affidavit").
18 (*Id.* at 23–72.) Agent Dunn has been employed as a special agent since June 2004. (*Id.*
19 at 23.) After reviewing the application, Judge McKibben authorized the wiretap for TT-1
20 ("TT-1 Wiretap") on April 2, 2018. (*Id.* at 72.)

21 A third controlled buy was conducted on April 20, 2018, also using CHS-1. (ECF
22 No. 322 at 4 n.5; ECF No. 358-2 at 33.)

23 On April 30, 2018, the government submitted another request to extend the TT-1
24 Wiretap and for the wiretap of a second cellular telephone number (775) 379-4034,
25 believed to be used by Mora. (ECF No. 358-2 at 3–4.) This wiretap request was supported
26 by a roughly 57-page affidavit by Agent Dunn ("Second Affidavit"). (ECF No. 358-2 at 26–
27 83.) Judge McKibben also approved the wiretap on TT-2 ("TT-2 Wiretap"). (*Id.* at 83.)

28 ///

Both affidavits contained information regarding minimizing the wiretaps. (ECF No. 358-1 at 68–72; ECF No. 358-2 at 78–83.)

The purposes for the wiretaps included to obtain admissible information regarding:

- (i) the nature, extent, and methods of operation of the narcotics business of the Targets, including the commission of one or more of the Target Offenses;
- (ii) the identities of the Targets, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities;
- (iii) the receipt and distribution of contraband and money involved in those activities;
- (iv) the locations of contraband and of items used in furtherance of those activities;
- (v) the existence and locations of records relating to one or more of the Target Offenses;
- (vi) the location and source of resources used to finance their illegal activities;
- (vii) the location and disposition of the proceeds from those activities;
- (viii) any nexus with other drug trafficking organizations; and
- (x) to dismantle the drug trafficking organization's conspiracy.

(*E.g.*, ECF No. 358-1 at 5.) Dunn's First Affidavit further explains the objectives extended to revealing "the scope of the MORA DTO's operations (including the extent of Jose Mora's involvement), the MORA DTO's sources of supply, its distribution network, its connection to the Sureno street gang, and its connections to regional and international DTOs, and the members thereof." (*E.g.*, *id.* at 45; *see also* ECF No. 358-2 at 36 (Second Affidavit).)

Mora, along with 16 other defendants, were indicted under a superseding indictment³ on September 26, 2018, in the District of Nevada on various conspiracy, firearms, and drugs charges arising out of their alleged involvement with the Mora DTO. (ECF No. 192.)

Mora filed the instant Motion in 3:18-cr-00057-MMD-WGC on June 27, 2019. (ECF No. 322.) Defendant Dagoberto Mora-Silva joined the Motion in 3:18-cr-00055-MMD-WGC the following day and Mora refiled the same motion in that case on July 29, 2019.⁴ (See ECF Nos. 67, 78 (3:18-cr-00055-MMD-WGC).)⁵ Defendant Shawn Curl also filed a

///

///

³The original indictment was issued on June 27, 2018. (ECF No. 74.)

⁴The Court will grant the joinders in 3:18-cr-00055-MMD-WGC (ECF Nos. 67, 79).

⁵All other citations in this section are to the docket in 3:18-cr-00057-MMD-WGC.

1 supplement to his joinder of the Motion (ECF No. 381-1) which all other noted Defendants
2 orally joined at a hearing on the Motion on August 16, 2019 (“Hearing”).⁶ (ECF No. 383.)

3 The arguments discussed below are considered as submitted by Mora and all co-
4 Defendants who joined in the Motion and Curl's supplement.

5 **III. DISCUSSION**

6 Defendants paramountly challenge the legitimacy of the TT-1 Wiretap. (ECF No.
7 322 at 12–30.) They contend that the government failed to show probable cause of any
8 drug conspiracy or necessity for a wiretap and that the affidavit supporting the TT-1
9 Wiretap omitted material information. (ECF Nos. 322, 365, 381-1.) Particularly regarding
10 the latter contention, Defendants request a hearing under *Franks v. Delaware*, 438 U.S.
11 154 (1978) (“*Franks* hearing”). (ECF No. 322 at 13.) At the Hearing, it also became evident
12 that Defendants further argue that the extension of the TT-1 Wiretap *and* the additional
13 TT-2 Wiretap were unlawful as they derive from the information supporting the initial TT-1
14 Wiretap. (See, e.g., ECF No. 322 at 28 n.79.) The Court considers Defendants’ arguments
15 within the framework the Ninth Circuit has provided for considering wiretap affidavits and
16 ultimately decides that Defendants have not demonstrated they are entitled to suppression
17 of the wiretap evidence or allegedly derivative evidence in this case.

18 **A. Defendants’ Challenge to the Existence of Probable Cause of a** 19 **Conspiracy**

20 Before turning to review of necessity, the Court considers Defendants’ threshold
21 arguments. First, Defendants contend that the government’s investigation into a
22 ///

23 ⁶The Court granted Curl's motion to supplement his previous motion to join (ECF
24 No. 381), and the government responded to Curl's supplement (ECF No. 390.) Curl also
25 filed an untimely motion for leave to file his own motion to sever and to join in Defendant
26 Munera's motion to suppress (ECF No. 342) (“Curl's Second Motion to Join”). (ECF No.
27 391-2.) In Curl's Second Motion to Join, Curl essentially challenges the second wiretap
28 application because it includes information of the traffic stop and evidence obtained that
is at issue in Munera's motion to suppress. At a hearing on September 9, 2019 (ECF No.
423), Munera withdrew his motion and thus Curl's joinder was denied as moot.
Nonetheless, the Court notes that Curl's contention does not alter the Court's conclusion
infra that the TT-2 Wiretap was supported by probable cause or that its supporting affidavit
is a full and complete statement of the facts.

1 conspiracy was unsupported by probable cause. (ECF No. 322 at 14–17; ECF No. 381-1
 2 at 6–15.) They essentially contend that the TT-1 Wiretap was itself used to establish the
 3 requisite probable cause the government needed in the first instance. (*E.g.*, ECF No. 381-
 4 1 at 14.) Defendants next argue that to the extent probable cause of a drug conspiracy
 5 was absent, a wiretap was therefore not necessary for investigation into the non-
 6 conspiracy drug offenses for which the government already had evidence given the CHS-
 7 1 drug buys. (ECF No. 322 at 17–18; ECF No. 381-1 at 14.) The government contends
 8 that both affidavits demonstrate probable cause, specifically identifying the probable
 9 cause statements in the Second Affidavit and noting the caselaw that the government is
 10 entitled to leeway when investigating a conspiracy, discussed *infra*. (ECF No. 358 at 13,
 11 17.) Because the Court finds that the government’s investigation into a Mora-led
 12 conspiracy was supported by probable cause, the Court does not address Defendants’
 13 secondary contention.

14 “The elements of conspiracy are ‘(1) an agreement to accomplish an illegal
 15 objective, and (2) the intent to commit the underlying offense.’” *United States v. Moe*, 781
 16 F.3d 1120, 1124 (9th Cir. 2015) (quoting *United States v. Herrera–Gonzalez*, 263 F.3d
 17 1092, 1095 (9th Cir. 2001)). *Id.* There is a notable exception to conspiracy liability—the
 18 buyer-seller rule. Under this rule “mere sales to other individuals do not establish a
 19 conspiracy to distribute or possess with intent to distribute . . .” *Id.* (internal quotation and
 20 citation omitted). Further, “[a] conviction for ‘conspiracy requires proof of an agreement to
 21 commit a crime other than the crime that consists of the sale itself.’” *Id.* (quoting *Lennick*,
 22 18 F.3d at 819). A court reviewing whether it may be reasonably concluded that a
 23 conspiracy exists “take[s] into account all . . . the evidence surrounding the alleged
 24 conspiracy and make[s] a holistic assessment.” *Id.* at 1125.

25 Defendants maintain that the only assertion of a conspiracy is the statement in the
 26 First Affidavit that “[a]ccording to intelligence obtained in the investigation, MORA has
 27 connections to the targets.” (ECF No. 322 at 16; see ECF No. 358-1 at 28.) The Court
 28 finds the First Affidavit and certainly the Second Affidavit provide more. To be clear,

1 establishing probable cause generally only requires that there is evidence to support
2 probability—not a prima facie showing—of criminal activity. *Franklin v. Fox*, 312 F.3d 423,
3 438 (9th Cir. 2002) (internal quotations and citation omitted). Such evidence need not be
4 admissible, but only legally sufficient and reliable. *Id.* (citation omitted).

5 As noted, the First Affidavit identified six target subjects at the time. (ECF No. 358-
6 1 at 28–30.) The First Affidavit indicates that Mora and three of the targets are documented
7 Sureno gang members. (*Id.*) It also states, for example, that Grageda is believed to obtain
8 methamphetamine from Mora and utilizes members of another gang, for which Grageda
9 is a founding member, to distribute the methamphetamine in the Reno area. (*Id.* at 29.) It
10 provides that Vega is a distributor to whom Mora also supplies methamphetamine and that
11 Vega additionally obtains drugs from other sources of supply. Cepeda is noted as a close
12 associate of Grageda and also a Sureno gang member. (*Id.*) The Affidavit notes that
13 Moreira is believed to be a supplier of methamphetamine to Mora and has a substantial
14 history of drug trafficking and is a documented Sureno gang member with ties to the
15 Mexican Mafia. (*Id.*) The Affidavit also provides that Stewart is believed to be a drug runner
16 for Mora. (*Id.* at 29–30.) Considered holistically, the Court finds that the First Affidavit
17 establishes more than a transactional relationship between Mora and the other target
18 subjects and supports the probability of a conspiracy to distribute between them. The
19 Second Affidavit builds upon this probability with information as to more targets and
20 communications regarding contact with suppliers and drug couriers working for Mora.
21 (ECF No. 358-2 at 36–52.)

22 The Court therefore finds that the government's investigation was supported by
23 evidence of probability of an ongoing conspiracy. The Court now turns to the issue of
24 necessity.

25 **B. The Necessity of the Wiretaps**

26 There is a statutory presumption against the intrusive investigative method of a
27 wiretap that the government must overcome before it may obtain one. *U.S. v. Gonzalez,*
28 *Inc.*, 412 F.3d 1102, 1112 (9th Cir. 2005); *see also U.S. v. Canales Gomez*, 358 F.3d

1 1221, 1224 (9th Cir. 2004) (“Title III of the Omnibus Crime Control and Safe Streets Act of
2 1968, 18 U.S.C. § 2518, prohibits electronic surveillance by the federal government except
3 under specific circumstances.”). The government overcomes this presumption only by
4 proving a wiretap is necessary. *Gonzalez, Inc.*, 412 F.3d at 1112. “Together, 18 U.S.C. §
5 2518(1)(c) and (3)(c) comprise the necessity requirement for wiretap orders.” *Id.* There
6 are three alternative methods under 18 U.S.C. § 2518(1)(c) whereby the government may
7 establish necessity for a wiretap. *Id.* “The government may show that traditional
8 investigative procedures (1) have been tried and failed; (2) reasonable appear unlikely to
9 succeed if tried; or (3) are too dangerous to try.” *Id.* (citing *United States v. Smith*, 31 F.3d
10 1294, 1298 n.2 (4th Cir. 1994)). This showing must be supported by “a full and complete
11 statement of the facts.” *Canales Gomez*, 358 F.3d at 1224. The wiretap statute “includes
12 its own exclusionary rule, requiring suppression of wiretap evidence that the government
13 obtains in violation of [18 U.S.C. § 2518].” *United States v. Rodriguez*, 851 F.3d 931, 937
14 (9th Cir. 2017) (citations omitted).

15 In *Rodriguez*, the Ninth Circuit Court of Appeals clarified that a district court must
16 apply the same two-step process it considers when considering a motion to suppress
17 wiretap evidence. *Id.* at 937–38. First, the court must engage in de novo review to
18 determine whether the information included in the affidavit supporting a wiretap application
19 “amounts to a full and complete statement as to whether or not other investigative
20 procedures have been tried and failed or why they reasonably appear to be unlikely to
21 succeed if tried or to be too dangerous.” *Id.* at 937 (internal quotations and citation
22 omitted). Second, the court reviews the wiretap-issuing judge’s finding that the wiretap
23 was necessary under 18 U.S.C. § 2518(3)(c) and his/her decision to authorize the wiretap
24 for an abuse of discretion. *Id.* (citations omitted).

25 ‘Each wiretap application, standing alone, must satisfy the necessity requirement.’
26 *Id.* at 939. Even within the same investigation, the government cannot transfer a statutory
27 showing from one wiretap application to another. *Gonzalez, Inc.*, 412 F.3d at 1115; see
28 also *Rodriguez*, 851 F.3d at 941–42 (citing *United States v. Blackmon*, 273 F.3d 1204,

1 1222 (9th Cir. 2001)) (explaining that the second affidavit cannot be an “impermissible
2 ‘carbon copy’ of the first”).

3 The Court addresses the first prong of whether the information in Agent Dunn’s two
4 affidavits are full and complete, which requires a examination of Agent Dunn’s
5 representation as to necessity, before turning to address the second prong of whether
6 Judge McKibben abused his discretion in authoring the wiretaps.

7 1. Full and Complete Statement of Facts

8 The Court’s de novo review of whether the affidavits include a full and complete
9 statement of the facts is “critical.” *Rodriguez*, 851 F.3d at 938. This is a fact-intensive
10 inquiry confine to only the information in the affidavits. *Id.* at 938–39. The “affidavit must
11 include ‘specific facts relevant to the particular circumstances’ of the case and not
12 boilerplate conclusions.” *Id.* at 939. Boilerplate conclusions are explanations that “merely
13 describe inherent limitations of normal investigative procedures.” *Id.* at 941 (citations
14 omitted); *see also Blackmon*, 273 F.3d at 1208 (suppressing wiretap evidence in part
15 because “the [wiretap] application contains *only* generalized statements that would be
16 true of any narcotics investigation”) (emphasis added). However, some boilerplate
17 language is permissible because the level of detail in each affidavit is reviewed as a
18 whole—not piecemeal. *Id.* at 942; *see also United States v. Fernandez*, 388 F.3d 1199,
19 1237 (9th Cir. 2004) (concluding that wiretap affidavit satisfied the requirements of §
20 2518(1)(c) despite the fact that it included some statements merely describing the inherent
21 limitations of traditional investigative techniques); *United States v. Torres*, 908 F.2d 1417,
22 1423 (9th Cir.1990) (“The presence of conclusory language in the affidavit will not negate
23 a finding of necessity if the affidavit, as a whole, alleges sufficient facts demonstrating
24 necessity.”).

25 The Court finds that both affidavits include information about traditional methods
26 used before the TT-1 Wiretap and the TT-2 Wiretap were sought for the government to
27 demonstrate necessity. The First Affidavit explains that the government used one
28 confidential human source (CHS-1) to purchase methamphetamine on two separate

1 occasions. (ECF No. 358-1 at 32–38.) Pen registers with GPS locator, physical
2 surveillance, toll analysis, database checks for relevant data—leads, criminal records,
3 vehicle registration, administrative subpoenas to telephone service providers, one mail
4 cover, and public records checks for property and bank records to acquire information
5 about the Mora-led DTO were also used before seeking the TT-1 Wiretap. (*See generally*
6 *id.* at 48–67.) The Second Affidavit explained that investigators continued to use many of
7 these traditional methods, and that pen registers, trap and trace information and telephone
8 subscriber information were used in both wiretaps. (ECF No. 358-2 at 31–32.) These
9 methods, and others, in conjunction with the information derived from the TT-1 Wiretap,
10 *inter alia*, revealed ten additional target subjects, that Mora dealt drugs beside
11 methamphetamine, and Mora’s dealings in firearms, but failed to identify key information,
12 such as Mora’s source of supply. (ECF No. 358-2 at 31–67.)

13 Importantly, the Second Affidavit is not an exact reproduction of the First Affidavit.
14 Specifically, investigators sought the TT-2 Wiretap because the TT-1 Wiretap was not
15 intercepting certain communications relevant to the target subjects and offenses, even
16 though there was, for example, evidence that Mora had sent drug couriers to pick up
17 supplies in California. (*E.g.*, ECF No. 358-2 at 66–67.) The Second Affidavit additionally
18 reveals that investigators used CHS-1 to conduct another control methamphetamine
19 purchase on April 20, 2018 (ECF No. 358-2 at 53–55.) This affidavit also states that one
20 source of information (“SOI”)—albeit with limited knowledge of Mora and the Mora DTO—
21 was identified and that agents continued to solicit information from SOIs. (ECF No. 358-2
22 at 69–70.) Unlike with the First Affidavit, the Second Affidavit also explains that a pole
23 camera was installed near one of Mora’s drug stash houses and agents used mobile
24 ground level devices at Mora’s stash house and apartment. (*Id.* at 74.)

25 In any event, Defendants argue a lack of necessity based on numerous
26 contentions. The defense filed an affidavit by Phillip J. Carson who served with the FBI for
27 over 20 years to support their claims that Agent Dunn’s affidavits failed to show necessity

28 ///

1 for the TT-1 Wiretap and the TT-2 Wiretap. (ECF No. 322-3.)⁷ Carson attests that the
2 government should have more thoroughly engaged in using normal/traditional methods
3 before seeking a wiretap and alleges that investigators ‘cut corners.’ (*Id.* at 6, 15.) He
4 specifically contends that the government should have (1) used CHS-1 to obtain further
5 details about suppliers “Bear,” “Gordo” and or “Bear’s cousin,” (2) pursued three
6 individuals (“CS-2, CS-3 and CS-4”) and Cepeda as additional potential confidential
7 sources to advance the investigation—primarily due to connections with the Sureno street
8 gang, (3) insert and utilize an undercover agent (“UCA”), (4) pursue financial investigation,
9 (5) put a tracking device on Mora’s black Dodge Charger, and (6) install pole cameras.
10 (*Id.* at 6–16.)

11 The Court considers all contentions, except as to purported suppliers and to the
12 use of CS-2, CS-3, and CS-4 as potential confidential sources, as amounting to a
13 difference of opinion between Carson and Dunn—and the Court’s analysis focuses on the
14 content of the latter’s affidavit. However, the Court considers Carson’s affidavit to the
15 extent it is intertwined with or provides the basis for Defendants’ lack-of-necessity
16 arguments discussed *infra*. Upon considering Defendants’ arguments, the Court ultimately
17 finds that each of Agent Dunn’s two affidavits includes case-specific information on why
18 particular methods—continued or initiated—would not be effective in the Mora DTO
19 investigation or too dangerous.

20 First, Defendants argue that even assuming there was probable cause of a drug
21 conspiracy there was no genuine necessity for the TT-1 Wiretap over less intrusive means.
22 (ECF No. 322 at 18–21.) To support this point, Defendants reason that the First Affidavit
23 overstates the conspiracy and provides intentionally sweeping boilerplate objectives to
24 manufacture necessity. (*Id.* at 20–21.) As evident from the Court’s analysis *supra* and
25 *infra*, the Court disagrees and finds contrary to this contention.

26 ///

27 _____
28 ⁷Notably, Carson’s affidavit purports that Agent Dunn “misled” the Court. (ECF No. 322-3 at 3). But it became evident that there is no evidence of explicit misrepresentation, but instead assertions of omissions in Dunn’s affidavits—particularly the First Affidavit.

1 Defendants also argue a lack of necessity, claiming that at the time of the wiretap
2 application, the Mora DTO investigation already satisfied its principal objective—
3 identifying Mora’s source of supply. (*Id.* at 21–22.) Defendants specifically argue that the
4 government failed to take action on information it possessed early on regarding “Bear,”
5 “Gordo,” “Coco” and Moreira as Mora’s sources of supply for CHS-1. (*Id.*) Defendants
6 assert that the government’s failure to further investigate these sources of supply amounts
7 to a failure to exhaust CHS-1 in relation to “Bear,” “Gordo,” “Coco” because CHS-1 had
8 their information and a sufficiently intact relationship with them. (ECF NO. 322 at 22–23;
9 *cf.* ECF No. 323-3 at 7–9 (Carson’s related statements).) Defendants relatedly claim that
10 the government turned down or failed to act on CHS-1’s efforts to identify recruits to further
11 the investigation into the Mora DTO and appear to claim that Agent Dunn’s assertion in
12 the First Affidavit that he is “not aware of any other cooperators”—as potential confidential
13 sources—was either misleading or amounted to a material omission. (ECF No. 322 at 24
14 (claiming Dunn’s quoted statement is “inaccurate”).) Defendants’ position appears to be
15 grounded on Carson’s statements that based on information CHS-1 provided, CS-2, CS-
16 3, and CS-4 could have been used as potential confidential sources. (*Id.* at 23–24; ECF
17 No. 322-3 at 7–9.) In sum, Defendants’ contention of material omission(s) in the First
18 Affidavit appears to cumulatively consists of lack of information regarding CS-2, CS-3, and
19 CS-4 as potential sources and the failure to include “Bear,” “Gordo,” and “Coco” as
20 potential suppliers. (*E.g.*, ECF No. 322 at 28.) In this regard, Defendants request a *Franks*
21 hearing.

22 The Court concludes that Defendants have not made the required initial *substantial*
23 showing that Agent Dunn intentionally or recklessly omitted or misrepresented material
24 information. Defendants may obtain a *Franks* hearing only upon making “a preliminary
25 showing that the wiretap applications contained *material* misrepresentations or
26 omissions.” *Gonzalez, Inc.*, 412 F.3d at 1110 (citations omitted). In *Gonzalez, Inc.*, the
27 Ninth Circuit Court of Appeals explained that “[o]ur case law does not require clear proof
28 of deliberate or reckless omissions or misrepresentations at the pleading stage. . . .

1 Instead, at this stage we simply require the defense to make a *substantial showing* that
2 supports a finding of intent or recklessness [to misrepresent or omit material information].”
3 *Id.* at 1111 (emphasis added). In short, a *Franks* hearing “is appropriate where the
4 defendant makes a substantial preliminary showing that a false statement was (1)
5 deliberately or recklessly included in an affidavit supporting a wiretap, and (2) material to
6 the district court’s finding of necessity.” *United States v. Shyrock*, 342 F.3d 948, 977 (9th
7 Cir. 2003) (citing *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000)); *see also*,
8 *Blackmon*, 273 F.3d at 1222 (suppressing evidence from a wiretap because the circuit
9 court concluded that the wiretap application “contain[ed] material omissions and
10 misstatements” that when removed left a deficient application).)

11 Here, in briefing and at the Hearing, the government pertinently maintains that
12 information regarding “Bear,” “Gordo,” and “Coco” was erroneously included in the
13 discovery related to this investigation in that the government was being over-inclusive.
14 (*E.g.*, ECF No. 358 at 4 & n.2.) Of course, Defendants contend otherwise. Considering the
15 lack of record clarity as to “Bear,” “Gordo” and “Coco,” the Court directed the government
16 to submit additional affidavit by Agent Dunn for *in-camera* review regarding whether these
17 potential sources were pursued and/or determined to be unrelated to the Mora-led DTO
18 investigation. (ECF No. 399.) If the latter determination was made, the government would
19 then need to file a separate affidavit, explaining why information concerning “Bear,”
20 “Gordo” and “Coco” was produced as part of the discovery in this case. (*Id.*)

21 Responding to the Court’s directive, the government filed the requested affidavit for
22 *in-camera* review (“Sealed Affidavit”) (ECF No. 404) and an unsealed affidavit (“Unsealed
23 Affidavit”) (ECF No. 406) on September 5, 2019. Upon reviewing these affidavits, the Court
24 finds the Unsealed Affidavit supports the government’s explanation as to why statements
25 relating to “Bear,” “Gordo” and “Coco” were included in the discovery for this case. More
26 important, the Court is satisfied after reviewing the Sealed Affidavit that Agent Dunn did
27 not intentionally or recklessly omit *material* information. That is, the Court finds that the

28 ///

1 information as to “Bear,” “Gordo” and “Coco” if known to Judge McKibben would not likely
2 alter his determination in issuing the wiretaps.

3 As to Moreira, the government contends in briefing, without specific citation, that
4 Ninth Circuit precedent establishes that simply identifying a supplier does not establish
5 necessity. (ECF No. 352 at 7 n.3.) At the Hearing, the government noted that Moreira was
6 investigated and identified as a supplier in this case. (See, e.g., ECF Nos. 358-1, 358-2.)
7 Accordingly, the Court concludes that Defendants’ relevant arguments as to Moreira are
8 essentially moot.

9 As to the use of other potential confidential sources and further exhaustion of CHS-
10 1 the government asks that the Court applies the cases of *Caneles Gomez*, *Fernandez*,
11 and *Shyrock*, to reject Defendants’ contention that there was a lack of necessity for the
12 TT-1 Wiretap because of a potential for further success with confidential informants. (ECF
13 No. 358 at 18–24.) In their reply brief, Defendants claim that each of these cases are
14 factually distinguishable and uninstructional. (ECF No. 365 at 5–10.) The Court agrees that
15 *Caneles Gomez*, *Fernandez* and *Shryock* are factually distinct, but disagree that they are
16 uninstructional here.

17 In *Caneles Gomez*, the Ninth Circuit held that “[a] judicially imposed requirement
18 that the government attempts to use all potential informants before securing a wiretap
19 would be impractical and contrary to investigatory experience and the force of our
20 precedent.” 358 F.3d at 1227.⁸ There, the appeals court reversed a district court’s finding
21 that given the apparent availability of confidential informants, the wiretaps were not
22 necessary. *Id.* at 1223. The court noted that the district court improperly waived off affiant’s
23 averments regarding the use of these and other informants as “boiler-plate.” *Id.* at 1227.
24 The court of appeals took into consideration the unique law enforcement problems
25 presented by the investigations of conspiracies, reiterated that the government is entitled

26 ///

27 ⁸To the extent that Defendants argue that *Caneles Gomez* is at odds with
28 congressional intent (ECF No. 365 at 6–7), the Court notes that it is bound to follow the
Ninth Circuit’s decisions unless they have been undermined by subsequent authority—
which is not the case here.

1 to leeway in this context, and found sufficient that that the supporting affidavit “explained
2 in detail why in light of the broad goals of the investigation the continued use of informants
3 was unlikely to result in the necessary information.” *Id.* at 1226–27.

4 Similarly, in *Shryock* the Ninth Circuit found that necessity existed despite the
5 existence of informants because infiltration by informants into the Mexican Mafia could not
6 determine the scope of the conspiracy. *Shryock*, 342 F.3d at 976. There too, the circuit
7 court recognized that further use of cooperating informants would not likely realize “all of
8 the investigative objectives” of the conspiracy or reveal the “full nature and extent of the
9 criminal activities of all the major participants in [the Mexican Mafia] and to gather sufficient
10 evidence to successfully prosecute the participants for the target offenses.” *Shryock*, 342
11 F.3d at 976. In *Fernandez*, the Ninth Circuit found its holding in *Shryock* controlling.
12 *Fernandez*, 388 F.3d at 1236 (citing *Caneles Gomez*, 358 F.3d at 1226 & *United States*
13 *v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002)).

14 Defendants argue that as a general matter there is no reasonable analogy between
15 the Mexican Mafia in both *Shryock* and *Fernandez*—which is a large scale-vast-
16 sophisticated organization—and the purported Mora DTO. (ECF No. 365 at 7–9.)
17 Defendants additionally argue that in both *Shryock* and *Fernandez*, and unlike with the
18 Mora DTO, the existence of the Mexican Mafia and its criminal objectives as well as the
19 membership status of targets were established. (*Id.* at 8.) This argument appears to tie
20 back to Defendants’ position that the First Affidavit does not establish probable cause of
21 a Mora-led conspiracy, regarding which the Court has reached a contrary conclusion
22 *supra*. (*Id.* (positing that a Mora-led conspiracy and the status of target subjects were
23 merely hypothetical at the time of the first wiretap application and the only factual basis
24 appears to be that Mora was connected to the targets).)

25 Defendants’ positions regarding the distinctions between the alleged Mora DTO
26 and the Mexican Mafia or the facts of the three cases are well-taken. Nonetheless, the
27 three cases cumulatively reflect Ninth Circuit precedent that a court evaluates the
28 necessity of a wiretap in light of “the government’s need not merely to collect some

evidence, but to develop an effective case against those involved in the conspiracy.” *Rodriquez*, 851 F.3d at 940 (citation omitted). The Ninth Circuit Court of Appeals “have ‘consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of . . . other satellite conspirators.’” *McGuire*, 307 F.3d at 1198 ; *see also Bennett*, 219 F.3d at 1121 n.3 (disagreeing that an affiants statement that the wiretap was needed to discover the full scope of the conspiracy lack specificity and noting that the court “have consistently upheld similar wiretap applications to discovery major buyers, suppliers, and conspiracy members”).

Based on this caselaw, the Court is not convinced that investigators had to exhaust CHS-1’s usefulness before seeking the TT-1 Wiretap. *See Caneles Gomez*, 358 F.3d at 1226 (“The government need not show that informants would be useless in order to secure a court-authorized wiretap.”). It is clear from Agent Dunn’s two affidavits that while the investigators continued to use CHS-1 in the Mora-DTO investigation, including for another controlled by in mid-April 2018, investigators concluded that CHS-1 had only limited knowledge of Mora’s associates, sources of supply, or the structure of the DTO to meet the substantial goals of the investigation. (*E.g.*, ECF No. 358-1 at 49.) The Court therefore finds that case-specific reasons supported Agent Dunn’s conclusion that relying on CHS-1 without wiretap would not likely achieve the full objectives—or the more material ones—of the investigation.

Furthermore, while Agent Dunn’s First Affidavit asserts a lack of awareness of “any other cooperators, or likely cooperators” (ECF No. 358-1 at 51), the continuation of the statement undermines Defendants’ contention that the “suggestion” of such was “inaccurate” (ECF No. 322 at 24). In full, Dunn provides:

I am not aware of any other cooperators, or likely cooperators, with significant information or the ability to assist in our investigation of the *Target Subjects* . . . Given the status of the confidential source and other sources of information available in this investigation, I do not believe that the use of the sources will be sufficient to fulfill the goals of this investigation.

///

1 (ECF No. 358-1 at 51 (emphasis added).) Defendants additionally contend that Dunn's
2 latter statement that he did "not believe that the use of the sources will be sufficient to fulfill
3 the goals of this investigation" is conclusory boilerplate. (ECF No. 322 at 24.) The Court
4 examines each of these arguments in turn.

5 As indicated, the defense identifies the potential cooperators as CS-2, CS-3, CS-4
6 and Cepeda. (*E.g.*, ECF No. 322 at 23; ECF No. 323 at 6–9) Notably, Carson's affidavit
7 reflects that CS-2, CS-3, CS-4 would all tie into investigations of "Bear," "Ochoa, aka
8 Gordo," and/or "Coco" as potential suppliers. (ECF No. 322-3 at 6–9.) Agent Dunn's
9 Sealed Affidavit submitted for *in-camera* review confirms the government's response that
10 there was no determined link between these individuals and the investigation into the
11 Target Subjects, including Mora. This is all fully in line with Agent Dunn's statement in the
12 First Affidavit—noted above—that Defendants challenge as "inaccurate."

13 Further, the First Affidavit addresses why investigators did not pursue Cepeda as
14 a cooperator in this investigation (ECF No. 358-1 at 58–59) although Carson contends
15 that this is "unacceptable" (ECF No. 322-2 at 10). Defendants' claim that Cepeda's
16 cooperation—particularly as a target subject and alleged co-conspirator—could have
17 "single-handedly set the government on course to achieving all of its ambitious
18 investigative objectives" by providing "inside knowledge of the purported drug conspiracy."
19 (ECF No. 322 at 23.) The First Affidavit reveals that Cepeda was interviewed by Reno
20 Police Department ("RPD") officers after his arrest on March 28, 2018 and expressed a
21 desire to work with law enforcement. (ECF No. 358-1 at 58.) The affidavit further notes
22 that due to Cepeda's "lengthy and violent criminal history, including being a registered sex
23 offender, investigators are unwilling to utilize [his] cooperation that could result in [his]
24 early release from custody or dismissal of charges." (*Id.*) Importantly, the First Affidavit
25 additionally explains that Cepeda "did not provide [RPD] any information regarding the
26 MORA DTO's structure, hierarchy, distribution network, or methamphetamine source of
27 supply." (*Id.* at 58–59.) For this reason, Agent Dunn concluded that "it is unlikely that an
28 interview of CEPEDA by the FBI would help achieve the goals of the investigation." (*Id.* at

1 59.) This information does not lead to an inference supporting Defendants' broad claim
2 that Cepeda could be relied on to "single-handedly" attain the objectives of the
3 investigation into the Mora DTO.

4 Moreover, it is particularly important that Judge McKibben was informed regarding
5 Cepeda's offer of cooperation. *Cf. United States v. Ippolito*, 774 F.2d 1482, 1486–87 (9th
6 Cir. 1985) (finding statements in affidavit regarding confidential informants' willingness to
7 testify and potential to uncover the entirety of the conspiracy under investigation amounted
8 to material omissions warranting suppression). Additionally, even accepting that Cepeda's
9 cooperation could have revealed information, the Court reiterates the appeals court's
10 statement in *Caneles Gomez* that "[t]he government need not show that informants would
11 be useless in order to secure a court-authorized wiretap." 358 F.3d at 1226 (citation
12 omitted).

13 In sum, the Court finds Agent Dunn's statement regarding the availability of
14 additional sources is sufficiently supported. The Court accordingly finds contrary to
15 Defendants' argument that Agent Dunn's statement that he did not believe that the use of
16 the sources will be sufficient to fulfill the goals of this investigation was conclusory
17 boilerplate. Based on the foregoing, the Court concludes that the high threshold for a
18 *Franks* hearing has not been established in this case.

19 Defendants also rely on Carson's affidavit to assert that conducting a financial
20 investigation (or a more complete one) was a condition precedent to seeking a wiretap to
21 support their lack of necessity contention. (ECF No. 322 at 24–26.) Defendants cite no
22 legal authority for this proposition and the Court does not find it persuasive in light of the
23 explanations provided in the two affidavits, although the Court agrees with Defendants
24 that the two affidavits are "facsimiles of each other" concerning the financial investigation
25 (*id.* at 25). (See ECF No. 358-1 at 67; 358-2 at 77–78.) The affidavits provide that
26 investigators performed public records checks for property and bank records, but were
27 unable to identify key assets of Mora DTO members or additional subjects through the
28 checks. (*Id.*) They specifically provide that at the relevant times further financial

1 investigation would have been unproductive because no information regarding bank
2 accounts had been disclosed and there was no information beyond the payment of cash
3 being used to purchase narcotics. (*Id.*) The government argues that such information, in
4 light of the other information provided in the affidavits, does not undermine Judge
5 McKibben's finding of necessity. (ECF No. 358 at 25.) The Court agrees with the
6 government. The Court finds that the affidavits provide reasons why a more expansive
7 financial investigation was unlikely to succeed at the time. The Court also considers the
8 statements in light of the fact that the government need not exhaust all traditional methods
9 of investigation before seeking a wiretap.

10 Defendants further rely on Carson's affidavit to argue that the government's
11 reasons for declining to introduce a UCA is misleading and belied by the facts. (ECF No.
12 322 at 26.) Defendants particularly support their contention by focusing on a single detail
13 regarding CHS-1—whether Mora considered him trustworthy—and making reference to a
14 drug transaction that purportedly supports that Mora was willing to sell to strangers. (*Id.*)
15 Indeed, Defendants quote language in the First Affidavit where Agent Dunn notes that
16 “Mora appears to consider CHS-1 a friend, and therefore is more trusting of CHS-1 than
17 Mora would be of a stranger.” (ECF No. 358-1.) Relying on Carson, Defendants posit that
18 Mora and CHS-1 had a trusting relationship and that such relationship supports a
19 conclusion that “[t]he government's assertion that a UCA had not [sic] ‘trustworthy’ sponsor
20 for an introduction with Mr. Mora” is unsupported. (ECF No. 322 at 26.) Defendants’
21 conjecture is based on a misreading of the statements in the First Affidavit. The First
22 Affidavit provides that a UCA had not been used to infiltrate the Mora DTO because such
23 information would not likely accomplish the goals of the investigation. (ECF No. 358-1 at
24 46.) This conclusion was premised on Agent Dunn's opinion that a successful introduction
25 of a UCA required an informant to vouch for *the UCA's trustworthiness and legitimacy* as
26 a drug trafficker. (*Id.*) The Court reads the affidavit as relevantly speaking of the UCA's
27 trustworthiness—not CHS-1, although the affidavit does in other parts conclude that Mora
28 did not trust CHS-1 enough to share information regarding Mora's timing or movement

1 relative to obtaining supplies of methamphetamine (ECF No. 358-1 at 49–50). At best,
2 Carson's affidavit only offers that he disagreed with Agent Dunn's assessment of whether
3 Mora trusted CHS-1.

4 Further, Defendants fail to contend with the other reasons provided in the First
5 Affidavit as to why the introduction of the UCA was unlikely to succeed in a way that would
6 advance the objectives of the investigation or be too dangerous. The First Affidavit
7 explains, *inter alia*, that even if CHS-1 was able to make a successful introduction of a
8 UCA, the UCA would only be at the same level as CHS-1 and thus unable to infiltrate the
9 Mora DTO at a high enough level to learn significant information about its overall
10 operations. (ECF No. 358-1 at 46–48.) Agent Dunn also stated that based on his
11 experience attempts by CHS-1 to introduce a UCA would likely raise Mora's suspicion to
12 terminate his association with CHS-1. (*Id.* at 48.) Finally, the First Affidavit concludes that
13 the risks of introducing a UCA to deal “with violent Sureno gang members” were too great
14 compared to the anticipated limited benefits from such attempts. (*Id.*) The Second Affidavit
15 also reflects that the investigators lacked a connection with ties to the higher levels of the
16 DTO to install a UCA to advance the objectives of the investigation. (ECF No. 358-2 at
17 70.) The Court finds the statements cumulatively in the First Affidavit and separately in the
18 Second Affidavit amount to sufficient case-specific details even if the Court accepted
19 Defendants' narrow trustworthiness argument.

20 Defendants also argue that the use of a pole camera and installing a tracking device
21 on Mora's vehicle—his black Dodge Charger—were all readily available investigative
22 options. (ECF No. 322 at 26.) They cite only to Carson's affidavit in support, which
23 essentially explains the utility of a pole camera in an investigation. (*Id.* at n.77 (citing
24 Carson affidavit).) However, the First Affidavit does not question the utility of a pole
25 camera. It specifically states that a pole camera had not been installed because
26 investigators had not been able to secure appropriate locations in the vicinity of the target
27 subjects' residences—for various reasons—to install cameras. (ECF No. 358-1 at 63.)
28 Agent Dunn also concluded in his experience that pole cameras in combination with other

1 normal investigative techniques alone would not meet the objectives of the investigation
2 because they could not capture sound to disclose the substance of meetings. (*Id.* at 63–
3 64.) While this latter point appears to be an inherent limitation, the Court finds the other
4 reasons provided are sufficiently case specific.

5 The First Affidavit further explained that if the opportunity arose, investigators will
6 install pole cameras. By the time of the Second Affidavit, investigators had installed a pole
7 camera in the vicinity of Mora’s drug stash house and a mobile ground level surveillance
8 camera for the same and Mora’s apartment residence. (ECF No. 358-2 at 74.) The Second
9 Affidavit states, however, that the pole camera malfunctioned after installation and the
10 mobile ground surveillance cameras provided limited view of Mora’s apartment and stash
11 house. (*Id.*) This is sufficient.

12 Regarding the placement of a tracking device on Mora’s vehicle, Carson explains
13 the efficacy of a tracking device and concludes such is why the government should have
14 used a vehicle tracking device on “Mora’s Dodge Charger.” (ECF 322-3 at 14.) The First
15 Affidavit provides that investigators had identified the vehicle Mora primarily utilized but
16 had been unable to determine the primary vehicles of other target subjects with any degree
17 of certainty. The affidavit also notes that investigators had been unable to identify a safe
18 and secure location frequented by Mora to install a tracking device. The First Affidavit
19 stated that attempts would be made to install a tracking device once the opportunity arises.
20 These statements, while providing case-specific reasons in conjunction with other unnoted
21 inherent limitations (see ECF No. 358-1 at 64), may also be deemed to suggest that the
22 government acted prematurely in seeking the TT-1 Wiretap when considered alone. But,
23 in considering the First Affidavit as a whole, see *Rodriguez*, 851 F.3d at 942, the Court
24 reaches the opposite conclusion.

25 Beyond the subjects of Defendants’ protestations, the First Affidavit provides case-
26 specific details regarding the unlikelihood of achieving the investigation’s objectives with
27 only the continued use of physical surveillance in combination with other normal

28 ///

1 investigative procedures and conducting trash searches. (ECF No. 358-1 at 51–55, 62.)
2 The Second Affidavit does the same. (ECF No. 358-2 at 71–72, 73–74.)

3 In a footnote, Defendants additionally contend that the First Affidavit merely
4 describes inherent limitations in connection with telephone records analysis, searches and
5 seizures, witness immunity, and GPS location data. (ECF No. 322 at 24 & n.63). With the
6 exception of searches and seizures, which the Court addresses below, the Court
7 disagrees.

8 The First Affidavit explains the progress that had been made with telephone records
9 analysis, but then provides reasons why its continued use in combination with only other
10 normal investigative techniques would not accomplish the goals of the investigation. (ECF
11 No. 358-1 at 60–61.) While Agent Dunn does provide explanations based on his
12 experience with what drug traffickers generally do, he ties that experience into the facts of
13 this case. (*Id.* at 61.) He notes that many of the targets who are in contact with Mora used
14 phones not subscribed to them. (*Id.*) He further notes that “[s]ome phones in contact with
15 TT-1 appear to be prepaid cell phones with generic subscriber information and not billing
16 contact” making it difficult to identify users and “renders phone analysis largely ineffective.”
17 (*Id.*) Thus, while Agent Dunn’s explanation includes inherent limitations, the Court cannot
18 agree that he “merely” provides inherent limitations.

19 As to witness immunity, much of the reasons provided in the First Affidavit directly
20 concerns Cepeda, which the Court addressed *supra*. (ECF No. 358-1 at 58–59.) The
21 affidavit otherwise explains that granting immunity to particular witnesses would risk
22 compromising the investigations, with false leads—for example, because investigators
23 were not clear on the relationship among the Mora DTO members and the members of
24 other DTOs. (*Id.* at 59.) The First Affidavit also stated that “[n]o witnesses, nor potential
25 witnesses, ha[ve] been granted immunity because, at this point, investigators are not
26 aware of any witnesses that would further the investigation to approach with an offer of
27 immunity.” (*Id.*) The Court finds these statements sufficiently case specific.

28 ///

1 The First Affidavit also highlights accuracy concerns with using GPS location data
2 with particularity to TT-1 and how used of such data had not allowed investigators to
3 identify supply and storing information regarding Mora's methamphetamine. (*Id.* at 65.)
4 While these specific details are interspersed with inherent limitations of GPS location
5 devices, the Court notes that some statements regarding inherent limitations is
6 permissible. See, e.g., *Fernandez*, 388 F.3d at 1237.

7 The Court finds Agent Dunn's two affidavits do contain some seemingly boilerplate
8 conclusions as to the likely effectiveness of certain techniques, particularly regarding the
9 use of search and seizure warrants, grand jury subpoenas, and further database checks.
10 (ECF No. 358-1 at 55–56, 63; ECF No. 358-2 at 72–73.) However, such conclusions are
11 largely based on Agent Dunn's experienced opinion from his then 14-years working as a
12 special agent. (See *id.*) For example, the affidavits provide that "at this stage" the
13 execution of search warrants would be counter-effective or premature because they would
14 not lead to a full understanding of the structure and operation of the Mora DTO, are
15 generally used to uncover evidence at the conclusion of an investigation, and would
16 disclose or compromise the current investigation. (ECF No. 358-1 at 55–56; ECF No. 358-
17 2 at 72–73.) Agent Dunn also stated that based on his experience and/or belief grand jury
18 subpoenas would either be premature, or risk alerting the target subjects to the
19 investigation or to flee to Mexico. (ECF No. 358-1 at 56–58; ECF No. 358-2 at 73.)

20 *Canales Gomez* suggests that conclusions based on such experience should not
21 be considered impermissibly boilerplate. *Canales Gomez*, 358 F.3d at 1227. There, the
22 circuit court concluded that the subject agent "more than adequately as well as
23 convincingly detailed why, using his professional judgment and in his experienced opinion,
24 traditional investigative techniques would not suffice and the continued use of confidential
25 informants would not meet the goals of the investigation." *Id.* The Court thus concludes
26 that Agent Dunn's conclusions regarding search and seizure warrants, and grand jury
27 subpoenas, while arguably boilerplate, were sufficient when he grounded them based on
28 his experience.

1 In sum, the Court finds that considered in their entirety the affidavits supporting both
 2 wiretap applications contain a “full and complete statement” as required by 18 U.S.C. §
 3 2518(1)(c).

4 **2. Whether Judge McKibben Abused His Discretion in Finding**
 5 **Necessity**

6 In determining whether there has been an abuse of discretion, the Court employs
 7 a “common sense approach to evaluate the reasonableness of the government’s good
 8 faith efforts to use traditional investigative tactics or its decision to forego such tactics
 9 based on the unlikelihood of their success.” *Rodriquez*, 851 F.3d at 944. “Though the
 10 wiretap should not ordinarily be the initial step in the investigation, . . . law enforcement
 11 officials need not exhaust every conceivable alternative before obtaining a wiretap.” *U.S.*
 12 *v. Rivera*, 527 F.3d 891, 902 (9th Cir. 2008) (internal quotation and citations omitted).

13 The overall arc of Defendants’ argument, particularly evident at the Hearing, is that
 14 the government acted hastily and cut corners, which includes highlighting that the first
 15 wiretap was requested only a short time into the investigation of the Mora DTO, and
 16 concluding that necessity is therefore lacking. (*E.g.*, 381-1 at 14 (contending that
 17 investigators “placed the cart before the horse”).) The pre-wiretap investigation here—
 18 roughly short of three months—is similar in duration to the timeframe in *Rodriquez*. In
 19 *Rodriquez*, the Ninth Circuit Court of Appeals explained that while the length of an
 20 investigation is a factor in a court’s reasonableness analysis, there is no minimum amount
 21 of days required for such investigation. 851 F.3d at 944. The court, however, considered
 22 the range of traditional techniques used within the given timeframe and ultimately
 23 concluded that “it does not appear the government sought to use the wiretap as the initial
 24 step in its investigation.” *Id.*

25 Here, the Court likewise considers the range of traditional techniques used prior to
 26 the request for the TT-1 Wiretap and separately the TT-2 Wiretap. See discussion *supra*.
 27 The Court additionally consider the explanations provided as to techniques not used and

28 ///

1 concludes that the government did not seek to use the wiretaps, particularly the TT-1
2 Wiretap, as the initial step in its investigation. *Id.*

3 Considering the purposes of the investigation into the Mora DTO and the
4 information sought and after reviewing the factual statements in Agent Dunn's two
5 affidavits, the Court concludes that Judge McKibben did not abuse his discretion in finding
6 necessity for the wiretaps in the investigation of the Mora DTO in the circumstances
7 presented here.

8 **3. Whether the Government Needed to Establish Probable Cause**
9 **and Necessity as to Each Defendant Whose Communication**
10 **Was Intercepted**

11 Defendants make additional contentions regarding probable cause and necessity
12 that the Court now addresses. Via Curl's supplemental briefing, Defendants contend that
13 the government was required to establish probable cause as to each Defendant not listed
14 as a target in the TT-1 Wiretap and must establish necessity as to each individual target
15 subject of a wiretap. (*E.g.*, ECF No. 381-1 at 20, 25.) The government contends the Ninth
16 Circuit caselaw is to the contrary. (ECF No. 390 at 2–3.) The Court agrees with the
17 government.

18 In *U.S. v. Reed*, the Ninth Circuit Court of Appeals explained that “[a]uthorization
19 for a wiretap is based on probable cause to believe that the *telephone* is being used to
20 facilitate the commission of a crime, and *the order need not name any particular person if*
21 *such person is unknown.*” 575 F.3d 900, 910 (9th Cir. 2009) (emphasis added). The Court
22 reiterated that the authority to wiretap is tied “to specific communications facilities or
23 locations”—and a cellular phone number, as for TT-1 and TT-2, are considered
24 communication facilities. *Id.* (internal quotations and citation omitted). “Identification of
25 individuals whose communications will be intercepted is only required ‘if known.’” *Id.*
(quoting 18 U.S.C. § 2518(4)(a)).

26 Here, it is unquestionable that the government established probable cause to
27 believe that TT-1 and TT-2 were being used to facilitate the commission of at least one
28 target offense noted in the respective affidavits. (See, e.g., ECF No. 358-1 at 30, 38–43,

50 (explaining that investigators verified Mora’s use of TT-1 to coordinate sale and distribution of methamphetamine in northern Nevada); ECF No. 358-2 at 37 (stating that “toll records reveal that phones used by a number of the drug traffickers and firearms traffickers have been in contact with TT-2, a cell phone also subscribed to and used by MORA”). There is no allegation that the government intercepted calls on a phone for which it had no order or had not established probable cause. Furthermore, to the extent Defendants now included in the case were not listed in either the First Affidavit or the Second Affidavit—the Court notes that the investigation expressly extended to “others as yet unknown.” (*E.g.*, ECF No. 358-1 at 19, 26.)

In light of Ninth Circuit caselaw, the Court finds that the government was not required to establish probable cause and necessity as to each target/unknown subject in order to intercept their communications of illicit activity where the government has established probable cause and necessity for the communication facilities—TT-1 and TT-2.

C. Minimization of the Wiretaps

The Court reviews *de novo* whether investigators minimized the monitoring of conversations not relevant to its investigation, as required under 18 U.S.C. § 2518(5). *Torres*, 908 F.2d at 1423. “The government has the burden to show proper minimization.” *Id.*

The wiretap statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to ‘minimize’ the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case.

Bennett, 219 F.3d at 1123 (quoting *Scott v. United States*, 436 U.S. 128, 140 (1978)). A standard of reasonableness governs an examination into whether the government adequately minimized its use of a wiretap. *Torres*, 908 F.2d at 1423. By this standard, the government is required to take “reasonable measures to reduce the interception of conversations unrelated to the criminal activity under investigation to a practical minimum while permitting the government to pursue legitimate investigation.” *Id.* (citation omitted).

1 Per Curl's supplemental briefing, Defendants essentially refer to the government's
2 first 10-day report related to the TT-1 Wiretap to argue that investigators failed to minimize
3 because they "failed to minimize any calls at all." (ECF No. 381-1 at 23.) The government
4 counters, arguing that this is insufficient to challenge the government's minimization
5 because it merely assumes failure to minimize and does not attack any particular
6 communications that should have been minimized. (ECF No. 390 at 6–7.) The Court finds
7 that the government took reasonable minimization measures.

8 Agent Dunn's two affidavits include measures to be implemented to minimize
9 communications not otherwise subject to interception. (ECF No. 358-1 at 68–72; ECF No.
10 358-2 at 78–83.) Here, Defendants' circular argument of a failure to minimize because
11 calls were not minimized does not undermine that the government's minimization
12 measures were reasonable. *See id.* at 1423 (citation omitted) ("The mere interception of
13 calls unrelated to the drug conspiracy does not indicate a failure to meet the minimization
14 requirement."). The relevant 10-day report reflects that TT-1 was primarily used for texting.
15 (ECF No. 390-1 at 6.) It shows that investigators captured a total of 473 communications
16 (including no answer and voice messages), and that 298 of these communications were
17 drug related. Of the drug-related communications here, 60 were pertinent drug-related
18 *calls* with none minimized. (*Id.*) The remaining 238 were text messages and 81 of those
19 were minimized. (*Id.*) The report specifically notes that the lack of call minimization was
20 due to TT-1 being "predominantly" used for criminal activity. (*Id.*)

21 Notably, the captured communications between Mora and Curl were text
22 messages. (*Id.* at 11–12.) The report documents that those text messages turned to
23 discussions regarding the purchase of drugs from Mora, evidently for resale by Curl, within
24 only the exchange of several messages. (*Id.*) Pertinently, the wiretaps identify the
25 distribution of controlled substances as a target offense—not just the conspiracy to do the
26 same—and to understand the nature and methods of the narcotics business of the
27 targets—instrumentally Mora. (*E.g.*, ECF No. 358-1 at 27; ECF No. 358-2 at 28.)
28 Moreover, the minimization portion of each affidavit expressly provides that interceptions

1 would be “suspended immediately . . . unless it is determined during the portion of the
2 conversation already overheard that the conversation is criminal in nature.” (ECF No. 358-
3 1 at 68; ECF No. 358-2 at 78.) Based on this record, the Court concludes that the
4 government undertook reasonable measures to minimize communications unrelated to
5 criminal activity under investigation and Defendants provide nothing to suggests that
6 further inquiry on the matter is needed.

7 Based on the foregoing, the Court concludes that Defendants have failed to
8 establish that the wiretap communications of either TT-1 or TT-2 are entitled to
9 suppression here. Accordingly, Defendants’ relevant motion to suppress (as
10 supplemented) is denied.

11 **IV. CONCLUSION**

12 The Court notes that the parties made several arguments and cited to several cases
13 not discussed above. The Court has reviewed these arguments and cases and determines
14 that they do not warrant discussion as they do not affect the outcome of the issues before
15 the Court.

16 It is therefore ordered that the motions to join in 3:18-cr-55-MMD-WGC (ECF Nos.
17 67, 79) are granted.

18 It is further ordered that Defendants’ motions to suppress (ECF Nos. 322, 381-1 (in
19 3:18-cr-57-MMD-WGC) and ECF No. 78 (in 3:18-cr-55-MMD-WGC)) are denied.

20 DATED THIS 11th day of September 2019.



21
22
23 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE
24
25
26
27
28